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No. 90-1908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CEDAR BROOK SERVICE STATION, INC., et al.,
Petitioners,

vs.

CHEVRON U.S.A., INC., and CUMBERLAND FARMS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Second Circuit properly hold (as has each of the other three Courts of Appeals that have considered this issue) that no termination or nonrenewal of a franchise agreement occurs when that agreement is assigned by one franchisor to another in compliance with state law and without disturbing the three elements of a petroleum franchise protected by the federal Petroleum Marketing Practices Act (i.e., the trademark license, the service station lease and the gasoline supply agreement), and that therefore the Act is inapplicable to the assignment?

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STATEMENT OF THE CASE

A. Proceedings Below.

On May 31, 1986, Chevron U.S.A. sold to Cumberland Farms all of Chevron's motor fuel marketing assets (i.e., storage facilities, delivery trucks, service stations, supply contracts with distributors and dealers, etc.) located in the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey and Delaware (collectively the "Northeast").

Petitioners (plaintiffs below) are 11 service station dealers in New York who, at the time of the sale to Cumberland, leased their service stations from Chevron pursuant to written leases and purchased gasoline from Chevron pursuant to written product supply agreements for resale under the "Gulf" trademark. Petitioners sued Chevron and Cumberland, claiming that Chevron's sale to Cumberland did not comply with the federal Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 (the "PMPA").

Chevron and Cumberland moved for summary judgment on two separate and independent grounds: First, the sale of Chevron's ongoing business operation complied with New York law governing assignments and left undisturbed each of the three elements of a franchise protected by the PMPA, i.e., the service station lease, the gasoline supply agreement and the Gulf trademark license. Nothing changed as a result of the sale, except that Cumberland stepped into Chevron's shoes by assuming and performing Chevron's obligations to the dealers. Accordingly, the sale did not result in a "termination" or "nonrenewal" of the dealers' franchise agreements, an essential prerequisite to any PMPA cause of action.

As a separate and alternative basis for its motion for summary judgment, Chevron demonstrated that, even if the PMPA were applied to the transaction, Chevron had fully complied with the market withdrawal provision (15 U.S.C. § 2802(b)(2)(E)), which provides that a franchisor is permitted to terminate or nonrenew a franchise if certain prescribed conditions are satisfied and proper notice is given to the dealer.

District Judge Costantino initially denied the motions for summary judgment. Pet.Appx. at 35-81. Judge Costantino held as a matter of law that the sale from Chevron to Cumberland automatically resulted in a nonrenewal of the franchise relationship between Chevron and plaintiffs (thus triggering the requirements of the PMPA), because Cumberland rather than Chevron would be renewing the dealers' franchise agreements upon expiration of the current term. Pet.Appx. at 47-58. With regard to Chevron's alternative ground for summary judgment, i.e., that Chevron had fully complied with the market withdrawal provision of the PMPA, Judge Costantino held that Chevron (as seller) had satisfied all of the elements of the market withdrawal defense within Chevron's control, but that a trial was required on the single issue whether Cumberland (as buyer) had tendered renewal agreements to plaintiffs in good faith and on a nondiscriminatory basis. Pet.Appx. at 58-74.

Following the decision of the Second Circuit in *Ackley v. Gulf Oil Corp.*, 889 F.2d 1280 (2d Cir. 1989), certiorari denied, 110 S.Ct. 1811 (1990), another PMPA case arising out of the same

transaction, Chevron and Cumberland renewed their motions for summary judgment on the ground that Chevron's sale to Cumberland did not result in a "termination" or "nonrenewal" of plaintiffs' franchise agreements and therefore did not trigger the requirements of the PMPA. District Judge Nickerson, to whom the case was then assigned, granted the renewed motions, relying on the decision of the Second Circuit in *Ackley* and that of the Sixth Circuit in *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917 (6th Cir. 1989), which also involved a sale of assets from Chevron to Cumberland on virtually identical terms. Pet.Appx. at 11-34.

The Second Circuit affirmed, relying on its earlier decision in *Ackley* and those in *May-Som, Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988) and *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). Pet.Appx. at 1-8.

B. Statement of Facts.

The relevant facts, which are summarized in the opinions of the district court (Pet.Appx. at 13-15, 35-40), are as follows:

Chevron structured the sale to Cumberland so as to minimize its impact upon Gulf service station dealers and to protect the continuity of dealer leases and supply contracts under the Gulf trademark. Thus, the sale agreement expressly required Cumberland to assume all of Chevron's contractual commitments, including its existing dealer leases and supply agreements. The sale agreement also provided that, as franchise agreements came up for renewal, Cumberland was obligated to offer, in good faith, a new franchise to each dealer on nondiscriminatory terms and conditions in accordance with the PMPA.

To assure the continued availability to Gulf dealers of the "Gulf" trademark, Chevron granted to Cumberland exclusive use of that trademark at Northeast service stations for a period of 15½ years at no royalty, with an option to renew the license indefinitely for an annual royalty of $1 million per year. Chevron also transferred its Northeast Gulf and Chevron credit card systems to Cumberland, and agreed to sell Cumberland virtually the entire gasoline output of Chevron's Philadelphia refinery. These agreements continue on a year-to-year basis.

On February 14, 1986, after the sale agreement was signed but before the sale closed, Chevron sent formal notices of nonrenewal under the PMPA to all Gulf dealers affected by the sale. Those notices stated that Chevron did not believe that its sale to Cumberland involved a termination or nonrenewal under the PMPA, but that Chevron nevertheless was taking the precaution of giving at least 180 days' notice of nonrenewal under the PMPA based on Chevron's decision to withdraw from the 10-state area. The notices also stated that, for the remainder of the term of the existing dealer agreements, Chevron's rights had been assigned and its duties delegated to Cumberland, and that Cumberland would honor all provisions of those agreements. The notices recited Cumberland's promise, upon expiration of each dealer's current agreements with Chevron, to offer nondiscriminatory renewal agreements as required by the PMPA.

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no conflicts among the Courts of Appeals, no conflict with the decisions of this Court, no novel federal issue, nor any other matter worthy of this Court's attention. All four Courts of Appeals that have considered this issue agree that, under the PMPA, an assignment from one franchisor to another does not result in a termination or nonrenewal (necessary to trigger the requirements of the PMPA) unless (i) the assignment results in the loss of one of the three elements of a franchise protected by the PMPA (i.e., the trademark license, the service station lease or the gasoline supply agreement) or (ii) the assignment violates state law.

Petitioners concede that the assignment at issue here complies with state law and that there was no loss or impairment of any of the three franchise elements protected by the PMPA. Nonetheless, they argue that the four Courts of Appeals have misinterpreted the statute, and that the act of assignment of itself triggers the PMPA. Petitioners' argument fails to give effect to the PMPA's express validation of assignments pursuant to state law. 15 U.S.C. § 2806(b). Because the assignment in this case fully complied with state law and the dealers lost none of the franchise protection provided by the PMPA, neither a "termination" nor a

"nonrenewal" occurred, and therefore the PMPA is not applicable.

Unlike the usual PMPA case in which a service station dealer argues that he was turned out of his station by the arbitrary or discriminatory act of his supplier, the transaction at issue here was carefully structured to accommodate Chevron's contractual and statutory obligations to its dealers, while still preserving the value of its marketing assets as an ongoing business operation. As the Sixth Circuit has noted:

> "[T]he PMPA strikes an explicit statutory balance between the interests of franchisees in freedom from arbitrary and discriminatory franchise terminations and the interests of franchisors in freedom to transfer motor fuel marketing assets in response to changing market conditions. Congress, no doubt, intended strong protection of the interests of franchisees. However, in an age of increasing corporate competition, the major petroleum firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions. * * *
>
> " 'There is nothing in the language of the [PMPA] suggesting that a major national acquisition and large scale divestiture for bona fide business reasons was intended to be stymied by the right of individual franchisees to insist on a prior relationship on exactly its former terms. A permanent status quo in the relationships of major national oil corporations with each other was not mandated by Congress through the PMPA. In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921-922 (6th Cir. 1989) (emphasis by the court).

I. THE COURTS BELOW PROPERLY HELD THAT CHEVRON'S SALE TO CUMBERLAND DID NOT TRIGGER THE PMPA.

A. The PMPA Applies Only to Terminations and Nonrenewals of Franchises.

The PMPA requires, as petitioners concede (Pls.Pet. at 14, n. 2), that a plaintiff must show either termination or nonrenewal as a basic prerequisite to any cause of action. Section 2805(c) states:

> "In any action under [the PMPA], the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship."

The courts below correctly held that petitioners could not satisfy this burden.

The primary focus of PMPA protection is on the dealer's right to sell gasoline under the trademark of a refiner, with a secondary focus on the dealer's rights to remain in his station and have a supply of gasoline:

> "The term 'franchise' is defined in terms of a motor fuel trademark license. It should be noted that the term is applicable only to the use of a trademark which is owned or controlled by a refiner. Secondary arrangements, such as leases of real property or motor fuel supply agreements, are incorporated in the definition of a franchise * * * [so that the Act] may not be circumvented by a termination or nonrenewal of the real estate lease or motor fuel supply agreement which thereby renders the trademark license valueless." S.Rep.No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S.Code Cong.& Admin.News 873, 888.

Chevron's sale of its Northeast marketing assets to Cumberland left undisturbed all of these rights protected by the PMPA. The dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; and they continued to do business under the same Gulf trademarks. They also retained all of their rights under the PMPA vis-a-vis their new franchisor, Cumberland.

The PMPA contemplates that franchise agreements between a supplier and its dealers can be assigned without triggering the termination or nonrenewal provisions. Section 2806(b) states:

"Nothing in this subchapter * * * prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise."

Thus, what occurred was an assignment from one PMPA franchisor to another authorized by state law, which did not result in the termination or nonrenewal of any dealer.

B. There Is No Conflict Among the Courts of Appeals.

All four Courts of Appeals, including the court below, that have considered this issue agree that the PMPA is not triggered by an assignment pursuant to state law that preserves the elements of a franchise protected by the PMPA. As the Sixth Circuit recently held, a franchisee seeking to establish a PMPA cause of action based on the assignment of his franchise from one franchisor to another must prove either "(1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises) * * * or (2) that the franchisor made the assignment in violation of state law." *May-Som Gulf, Inc. v. Chevron U.S.A. Inc.*, 869 F.2d 917, 922 (6th Cir. 1989).

The same rule was applied by the Second Circuit in the decision below and in its earlier decision in *Ackley v. Gulf Oil Corp.*, 889 F.2d 1280, 1281 (2d Cir. 1989), certiorari denied, 110 S.Ct. 1811 (1990). Accord: *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986); *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988).[1]

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[1] Other decisions hold that franchises can be assigned without triggering PMPA causes of action. *Burns Bros., Inc. v. RMT Properties, Inc.*, [1985-1986 Transfer Binder] Bus.Franchise Guide (CCH) ¶ 8468 (D.Or. 1985), affirmed, 805 F.2d 1039 (9th Cir. 1986); *McGee v. Gulf Oil Corp.*, [1985-1986 Transfer Binder] Bus.Franchise Guide (CCH)

C. The Holding Below Does Not Nullify the Market Withdrawal Defense of the PMPA.

The court below held that petitioners could not establish the loss or impairment of any of the three protected elements of a PMPA franchise and that the assignment fully complied with New York law. Petitioners do not contest these findings, but argue instead that all four Courts of Appeals have misinterpreted the PMPA. Thus, petitioners contend that, because the PMPA provides an affirmative defense to "termination" or "nonrenewal" based upon market withdrawal (section 2802(b)(2)(E)), this implies that every market withdrawal necessarily entails a "termination" or "nonrenewal." Pls.Pet. at 13-31. Any other view, they say, would render the market withdrawal provision "meaningless." Pls.Pet. at 13.

Petitioners' argument misperceives the nature of most market withdrawals. The market withdrawal provision of the PMPA contemplates that a franchisor deciding to withdraw from an area may sell or otherwise transfer its interest to a third party and terminate all existing franchises on 180 days' notice.[2] This is the usual method chosen by franchisors. In such circumstances, all of the requirements of the market withdrawal provision must be satisfied to establish an affirmative defense.[3]

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[2] As conceded by petitioners (Pls.Pet. at 29), the "assignment" referred to in the market withdrawal defense is the assignment of the franchisor's real estate interest in the service station premises, not an "assignment" of the franchise agreement, which is explicitly governed by section 2806(b).

[3] Except for Chevron's withdrawal from the Northeast, virtually every other reported market withdrawal case involves the situation where dealers were terminated on 180 days' notice—facing (at best) an immediate switch in brand name and an immediate increase in their rent. See, e.g., *King Service, Inc. v. Gulf Oil Corp.*, 834 F.2d 290 (2d Cir. 1987); *Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12 (1st Cir. 1986); *Jiminez v. B.P. Oil, Inc.*, 853 F.2d 268 (4th Cir. 1988), certiorari denied, 109 S.Ct. 1654 (1989); *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987); *Pride v. Exxon Corp.*, 911 F.2d 251 (9th Cir. 1990); *Southern Nev. Shell Dealers Ass'n v. Shell Oil Co.*, 634 F.Supp. 65 (D.Nev. 1985).

That the PMPA provides an affirmative defense in the case of some market withdrawals does not mean, however, that every market withdrawal necessarily involves a termination or nonrenewal. Before any PMPA defense is called into play, the plaintiff must first satisfy the burden of demonstrating that a termination or nonrenewal has occurred. 15 U.S.C. § 2805(c). Here, as permitted by section 2806(b), Chevron assigned all of its existing franchise agreements to Cumberland and required Cumberland to honor those agreements. Chevron arranged for continued use of the Gulf trademark and for continuation of the lease and supply agreements. Accordingly, lessee dealers were protected from changes in those agreements, such as rent increases, until the agreements expired. The dealers retained all of their rights under the PMPA against their new franchisor, Cumberland, including the right to receive the tender in good faith of renewal franchise agreements when their current agreements expired. 15 U.S.C. § 2802(b)(3)(A).[4] These affirmative steps by Chevron, all designed to preserve the three protected attributes of a franchise, are what distinguish this case from the run-of-the-mill market withdrawal. The aggregate protections afforded to dealers under this approach are greater than those under the market withdrawal defense.

Thus, petitioners are wrong in their contention that the decision below renders the PMPA market withdrawal provision meaningless. Any withdrawing franchisor not willing to make arrangements such as those made in this case must still comply fully with the market withdrawal provision.

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[4] It is anomalous that the only relief that petitioners seek in this case, i.e., the right to challenge as discriminatory the new franchise agreements tendered by Cumberland (Pls.Pet. at 11), is already preserved for them by section 2802(b)(3)(A). See *Lippo v. Mobil Oil Corp.*, 802 F.2d 975 (7th Cir. 1986), certiorari denied, 480 U.S. 918 (1987); *Pearman v. Texaco, Inc.*, 480 F.Supp. 767 (W.D.Mo. 1979); *Munno v. Amoco Oil Co.*, 488 F.Supp. 1114, 1119 (D.Conn. 1980); *Bellmore v. Mobil Oil Corp.*, 524 F.Supp. 850, 853 (D.Conn. 1981), affirmed, 672 F.2d 899 (2d Cir. 1981); *Meyer v. Amerada Hess Corp.*, 541 F.Supp. 321 (D.N.J. 1982).

Moreover, if Chevron's assignment to Cumberland were deemed to trigger the requirements of the PMPA, it is impossible to imagine an assignment that would not. Indeed, as the Connecticut district court held in *Ackley*, to accept petitioners' argument would read section 2806(b) out of the PMPA:

> "This court declines to accept a rule that an assignment necessarily constitutes a terminating event because the assignor does not continue as a party to the franchise relationship. On the basis of 15 U.S.C. § 2806(b), this court determines that the effect of the assignment as a terminating event under the PMPA is determined by reference to state law. A contrary holding would render § 2806(b) meaningless.
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> * * * * *
>
> "* * * [A]lthough the market withdrawal defense includes a wide range of conduct, some of which clearly does constitute a termination or nonrenewal, a market withdrawal does not necessarily constitute a termination or nonrenewal merely because of the existence of a market withdrawal defense." *Ackley v. Gulf Oil Corp.*, 726 F.Supp. 353, 360, n. 9 (D.Conn. 1989), affirmed, 889 F.2d 1280 (2d Cir. 1989), certiorari denied, 110 S.Ct. 1811 (1990).

II. THE DISTRICT COURT CASES RELIED UPON BY PLAINTIFFS HAVE BEEN WITHDRAWN OR ARE INAPT.

Against the overwhelming weight of authority relied on by the courts below, petitioners offer only the initial decision of District Judge Costantino, which was later vacated by District Judge Nickerson. Judge Costantino had held that because Cumberland, rather than Chevron, would be renewing the dealers' franchise agreements when they expired, Chevron's sale of its Northeast marketing assets and assignment of its franchise agreements to Cumberland would of necessity result in a nonrenewal of those agreements. Judge Costantino relied on the opinion of the New Jersey district court in *Florham Park Chevron, Inc. v. Chevron,*

[1987-1989 Transfer Binder] Bus.Franchise Guide (CCH) ¶ 9011 (D.N.J. 1987) ("*Florham Park I*"), and the unreported decision of the Massachusetts district court in *Chestnut Hill Gulf v. Cumberland Farms*, No. 86-3519 (D.Mass. 1988), which in turn relied upon *Florham Park I*. *Florham Park I* was criticized by the Sixth Circuit (*May-Som*, supra, 869 F.2d at 922-923, n. 3), and it has since been withdrawn by the New Jersey district court. *Florham Park Chevron Inc. v. Chevron U.S.A. Inc.*, No. 86-4648 (D.N.J. May 9, 1990) (1990 WL 61787). On a motion for reconsideration, the New Jersey court granted summary judgment to Chevron and Cumberland, holding that Chevron's assignment to Cumberland left undisturbed each of the three protected elements of a PMPA franchise and fully complied with New Jersey law.

Both *Florham Park I* (which had not yet been withdrawn) and *Chestnut Hill* were emphatically rejected in *Ackley*:

> "In two cases involving the identical transaction at issue in this lawsuit, federal district courts have ruled that the assignment from Chevron to Cumberland constituted a nonrenewal of the franchise relationship between Chevron and the dealers, even if the assignment was valid under state law, because Chevron necessarily would not continue as a party to the relationship. * * * These rulings fail to recognize the very purpose of the assignment event, whereby one party assumes the contractual rights and responsibility of another. Indeed, the whole point of assigning a franchise is to transfer the

responsibility of the franchise relationship to the assignee." *Ackley v. Gulf Oil Corp.*, 726 F.Supp. 353, 360, n. 9 (D.Conn. 1989), affirmed, 889 F.2d 1280 (2d Cir. 1989), certiorari denied, 110 S.Ct. 1811 (1990).[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] Petitioners' reliance on *Abadjian v. Gulf Oil Corp.*, 602 F.Supp. 874 (C.D.Cal. 1984), is also misplaced. Pls.Br. at 13. In *Abadjian*, the purchaser of the service stations, Thrifty Oil Company (analogous to Cumberland), had no right after the purchase to authorize the dealers to use the Gulf trademark (or that of any other refiner) and, therefore, could not have been a "franchisor" under the PMPA:

> "Thrifty's lack of Gulf trademark rights is undisputed. * * * This Gulf indicia represents the trademark rights essential to finding a valid franchise relationship." 602 F.Supp. at 879-880.